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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 506.

GULF REFINING COMPANY,
Petitioner,
(Libelant-Appellee below),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.
(Respondent-Appellant below).

BRIEF IN BEHALF OF PETITIONER.

STATEMENT.

This case comes up on writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree reversing a final decree of the District Court for the Southern District of New York entered in libelant's favor in a suit in admiralty brought to recover a general average loss under a policy of marine war risk insurance.

The parties will be described as they were in the District Court.

The opinion of the Commissioner appointed (with the consent of the parties) by the District Court to hear and

report on all issues (R., 160-179) is reported only in 1927 Am. Mar. Cas. 1669.

In confirming the Commissioner's report (R., 181), the District Court did not write any opinion.

The opinion of the Circuit Court of Appeals reversing the District Court and the Commissioner (R., 189-194) is reported in 27 Fed. (2d) 678, and in 1928 Am. Mar. Cas. 1371.

The decree of reversal of the Circuit Court of Appeals was filed on July 24, 1928 (R., 195). Certiorari was granted on November 26, 1928 (R., 197).

Jurisdiction of this court is invoked under the Act of February 13, 1925.

The Facts.

The facts are undisputed (except as to a question of custom, discussed at the end of this section), all of them being admitted in the pleadings or by stipulation (R., 2-11, 152-160).

Libelant is the successor in interest to the owners of a large cargo of gasoline shipped on April 10, 1915, from Port Arthur, Texas, bound for Rouen, France, on board the steamship *Gulflight*. Two bills of lading covering the shipment were duly executed by the carrier and accepted by the shipper, which bills of lading provided that general average should be payable according to the York-Antwerp Rules, 1890.

Respondent insurance company, on April 2, 1915, issued a policy of war risk insurance covering this cargo for the voyage above mentioned. By this policy, the owners of the cargo were insured in the sum of $27,690, the cargo being valued in the policy at $212,000. In other words,

respondent, by this policy, insured 27,690/212,000ths, or approximately one-eighth of the cargo risk. The policy is printed at page 155 of the Record.

On May 1, 1915, while proceeding on said voyage, the *Gulflight* was torpedoed by a German submarine near the Scilly Islands. The damage done by the torpedo was serious, but it did not prove fatal. For the safety of all interests concerned, the vessel was towed to the Scilly Islands, where some of her cargo was sold (the vessel being unable to carry it further with safety), assistance was given, and temporary repairs effected. On June 9th, the *Gulflight* resumed the voyage and, with convoy and assistance, arrived at Rouen on June 13th, and completed the discharge and delivery of the cargo to the consignee on June 18th.

In consequence of the torpedoing, certain extraordinary expenses and sacrifices of general average nature were necessarily incurred by the shipowners and other parties for the common benefit and safety of the interests involved in the ship, cargo and pending freight.

To make good these extraordinary expenses and sacrifices, a general average was stated according to law and contributions were assessed against the various interests at risk, ratably according to their respective values as saved.

The cargo in question was assessed $49,088.04, this being its proper share, based on a contributory value of $417,178. This contributory value was the actual value of the cargo saved and made good in general average as taken at the place and time of the termination of the venture. No question is raised as to the propriety of the general average adjustment.

Libelant duly paid the general average contribution assessed against the cargo and then claimed indemnity from respondent for the same proportion thereof as respondent's underwriting bore to the agreed policy value, viz., 27,690/212,000ths of $49,088.04 which equals $6,411.54.

Respondent, however, refused to indemnify libelant to this extent, claiming that since the contributory value exceeded the agreed policy value it should pay only that proportion of the amount claimed by libelant which the agreed policy value bore to the contributory value, viz., 212,000/417,178ths of $6,411.54, which equals $3,258.25.

Respondent paid and libelant received this lesser amount without prejudice. Libelant sues herein for the balance.

All of the testimony in the record bears only upon an issue of custom which respondent injected into the case by pleading that there was a custom prevailing in New York at the time this contract was made (1915), and that such custom was for underwriters to settle with assureds upon the basis contended for by respondent (R., 10).

Both lower courts have found that no such custom was proved (R., 168 and 190), and we assume that this Court will not wish to review these concurrent findings. However, there cannot be the slightest doubt as to their correctness.

Mr. Eldert, president of *respondent*, testified that after 1910 there was no settled practice in New York; that the practice was confused (R., 27, 28, 73, 74). Surely the respondent cannot impeach the testimony of its own president.

The testimony of libelant's expert witnesses, Davey and Mayhew, as well as the text writers quoted in Point Three of this brief, gives the clearest indication that method of

settlement contended for by libelant has been the predominating method in New York for many, many years.

Further discussion of the testimony and its ramifications (almost entirely immaterial) seems wholly unnecessary. In summary: there were four witnesses called who possibly could be said to be qualified to speak as to any custom prevailing at the time this contract was made (Davey, Eldert, Mayhew, Ullman). All of these but Ullman testified distinctly either that there was no settled custom or that the custom was as libelant, not respondent, contends (R., 27, 28, 73, 74, 87, 92, 111-114).

The Question Involved.

The fact that respondent insured only one-eighth of the cargo risk, instead of all of it, is of no importance to the question here involved. Respondent's share is simply one-eighth of what it would have been had respondent underwritten the entire agreed value. Subject to this qualification respondent's liability is exactly as though it had insured the whole agreed value.

The sole question presented in this case is whether, where cargo, insured under a valued policy, suffers from a peril insured against through being assessed a general average contribution based on a contributory value in excess of the agreed policy value, the assured should recover complete indemnity from his underwriters or only partial indemnity in the proportion which the agreed value bears to the contributory value.

Libelant contends for the principal of full indemnity; respondent seeks the rule of proportionate indemnity.

In a broad sense, this question is a question of construction of the contract of insurance. But the policy herein,

and cargo insurance policies generally, do not contain any provisions directly applicable. The question, therefore, is one of general importance and must be referred for solution to general principles, usages and authorities governing the construction of contracts of marine insurance.

The Decisions Below.

The Commissioner's report, upon which the District Court entered its decree, held in libelant's favor. The reasoning of the Commissioner may be summarized as follows:

It is found from text writers and statements of judges that the usage in this country for a period of more than two generations (except in Massachusetts) has been in accordance with libelant's contention. On principle, libelant's rule is preferable. A policy of insurance is intended to afford indemnity to the assured. As to general average claims, underwriters are bound by adjustments made fairly in foreign ports and under foreign laws. When they take a cargo risk, they know that the cargo may be subjected to general average contributions assessed under laws differing from their own, and assessed upon values differing from the insured values. Since full indemnity for these contributions has not been excluded by any express provision of the policy, it is a reasonable presumption that such exclusion was not intended. With respect to a large volume of international trade, insurance follows documents of title lodged with banks. It is certainly contrary to the policy of law that an undetermined, unprotected liability should attach to the ownership of goods incident to the holding of such documents. Lastly, the Commissioner held that his conclusion was established by the authorities in his jurisdiction.

The Circuit Court of Appeals reversed this decision. In its opinion, it fails to answer the various considerations pointed out by the Commissioner, and bases its holding largely on a conception of co-insurance.

The reasoning of the Circuit Court of Appeals is as follows:

The risk which an underwriter takes is dependent, in part, on value. An agreed value in the policy assures the underwriter against increases in value of the property insured. It is settled that partial losses (particular average) on cargo insurance are settled with underwriters according to the rule of proportion. The considerations which dictated the rule of proportion for partial losses apply likewise to indemnity for general average contributions. In fact, general average losses are of the same nature as particular average losses. The fact that the rule of proportion would give the assured more than indemnity for genera' average contributions where the insured value exceeds the agreed value is not a serious objection. Co-insurance is right in principle, is admittedly the law as to particular average on cargo, and should apply to general average on cargo, even though it has been held otherwise by the Circuit Court of Appeals for the Ninth Circuit and in an early New York case; and even though the established American rule as to hull insurance, except in Massachusetts, is otherwise.

POINT ONE.

The Legal Background.

A. Marine Policies.

The policy in question is a marine war risk policy and the loss (torpedoing) was due to a war risk. The principles involved, however, are precisely the same as would have been involved had the policy covered general marine risks and had the loss been due to some common marine risk such as a peril of the sea. Counsel have not contended, nor has either of the lower courts suggested that any distinction in principle is to be made, so far as this case is concerned, between war risk and general marine policies.

Most marine insurance, whether covering a vessel or cargo, is written through valued policies, that is, policies in which the value of the thing insured is mutually agreed upon between the assured and the underwriters and such value is stated in the policies. Such agreed value is, in the absence of fraud or mistake, conclusive. 38 *Corpus Juris* 1123.

One underwriter does not usually cover the whole risk, but only part of it. For example, in the case at bar, the respondent insured $27,690 on a cargo valued at $212,000. For his complete protection an assured must get enough policies so that the whole of the agreed value is covered. Otherwise, he becomes a co-insurer for the uncovered portion of the agreed value and as such has himself to bear a portion of each loss.

B. The Settlement of Particular Average Losses under Marine Policies.

Particular average is the name applied to any partial loss attributable to a peril insured against and not of a general average nature.

Although the policies may be in identical terms, there is a settled distinction in law and in practice between the settlement of particular average losses under hull policies and under cargo policies. This matter is fully covered in the noted opinion of Judge Addison Brown, in *International Navigation Co.* v. *Atlantic Mutual Insurance Company*, 100 Fed. 304 (S. D. N. Y. 1900), *affirmed on opinion below*, 108 Fed. 987, *cert. den.* 181 U. S. 623, known throughout the underwriting world as the *St. Paul Case.*

The following rules were laid down by Judge Brown:

In case of a particular average loss on a valued hull policy, the underwriters pay the full amount of that particular average loss (not exceeding the amount insured) without any inquiry as to the percentage of loss or as to whether the actual value of the ship exceeded the insured value or not. Thus if the shipowner has his vessel insured for $100,000 and she suffers damage from marine perils which it requires $20,000 to repair the underwriters pay the shipowner a loss of $20,000, irrespective of how much the vessel was actually worth or what the relation between insured value and actual value was. If, therefore, a vessel is fully insured at any reasonable value, the underwriters, in case of sea damage, pay in full the cost of the repairs necessary to restore her to her previous condition.

In case of a particular average loss on a valued cargo policy, however, the rule is different. The proportion or percentage of loss is ascertained by comparison at destina-

tion of damaged value with sound value and the underwriters pay that proportion or percentage of the insured value. Thus, if the cargo owner insures goods for $10,000 valued at $10,000 and the goods come into port damaged to the extent of 40% of their value (as determined by comparison of sound and damaged value) then the underwriters pay a loss of 40% of $10,000, or $4,000. Except as they may be incidental to the calculation of the percentage of loss, neither the market value nor the prime cost enters into the transaction at all.

The reasons for this distinction between the rules governing payment of particular average losses on hull policies and on cargo policies are so ably and exhaustively dealt with by Judge Brown in the *St. Paul Case* (100 Fed. 317 to 326) that it seems unnecessary for us to do more than refer to this opinion.

C. General Average Losses.

General average in its original application as between the parties jointly engaged in a maritime venture long antedated the practice of marine insurance and has, in fact, nothing to do with marine insurance. It is simply an adjustment between the parties to the venture for the purpose of imposing upon all equally an extraordinary loss which one has sustained for the common safety and benefit.

When a ship, after having made sacrifices for the common safety and benefit, comes into port, it is the duty of the master to exercise a lien on the cargo for general average contributions. Since it usually takes several weeks, at the least, to collect the necessary information for the preparation of the general average adjustment, the cargo is customarily delivered against general average bonds, in which the consignees agree to pay the general average

charges for which their goods are liable. Performance of these bonds is secured either by cash deposits or by underwriters' guarantees.

After the adjustment is made up, each party pays his contribution and receives any allowance which may be made to him on account of his goods having been sacrificed.

From the standpoint of the cargo owner, therefore, a general average contribution is a charge levied upon his cargo because other goods or money has been sacrificed or spent to save the venture as a whole, including his cargo. This contribution constitutes a lien on the cargo which must be paid or secured by the cargo owner before he may take possession.

While, therefore, the cargo owner may receive his cargo in good condition, the liability of that cargo to contribute in general average constitutes a loss incurred by the cargo owner as a direct result of the peril which gave rise to the general average sacrifice, though the loss is different in character from a partial loss of the cargo.

By the York-Antwerp Rules, 1890 (Rule 17), which were incorporated into the contract of affreightment covering the cargo in the case at bar, general average contributions are ratably assessed upon the basis of actual values of the property at the termination of the venture.

D. General Average Claims against Underwriters.

General average claims under marine insurance policies arise after and subsidiarily to the primary rights between the parties to the venture themselves. If the general average charges were caused by or through a peril insured against, then the debt which the goods have incurred by reason of the lien for contribution to these general average charges is a loss which the assured has suffered through

a peril insured against and is collectible from his underwriters. 38 *Corpus Juris* 1113.

In the case at bar, the general average charges were caused through torpedoing of the *Gulflight* by a German submarine. This was a war risk. Respondent's policy on libelant's goods covered against war risk. Respondent is, therefore, liable to reimburse libelant for the general average charges assessed against libelant's goods.

While the practice of settling particular average claims under valued marine policies has, at least since the decision in the *St. Paul Case*, become definitely and uniformly established, the practice of settling general average claims has for many years differed as between New York and San Francisco on one hand and Boston and England on the other.

The difficulty arises in cases where the actual or contributory value of the thing insured differs from the agreed policy value. Under the New York or American rule (as it has been called), the underwriters give the assured complete indemnity against general average contributions, not exceeding the amount insured, without inquiry as to whether the agreed policy value differs from the contributory value.

Under the English or Boston rule, the underwriters inquire as to the contributory value. If the contributory value exceeds the agreed policy value, then they only give the assured indemnity in the proportion that the agreed policy value bears to the contributory value. If the agreed policy value is greater than the contributory value, the rule applied rigorously would give the assured more than indemnity. No case has ever extended the rule this far, but the possibility is discussed *infra*.

The following cases have applied the New York rule:

Strong v. *New York Firemen Insurance Company* (1814) 11 Johnson 323 (cargo policy);

Providence Steamship Company v. *Phoenix Insurance Company* (1882), 89 N. Y. 559 (hull policy);

St. Paul Case, supra (1900) 100 Fed. 315 to 317 (hull policy);

International Navigation Co. v. *Sea Insurance Co.* (1904, 2d C. C. A.), 129 Fed. 13, *affirming* 124 Fed. 93 (hull policy);

Maldonado & Company v. *British & Foreign Marine Insurance Company* (1910, 9th C. C. A.), 182 Fed. 744; *cert. den.* 220 U. S. 622 (cargo policy).

The following cases have applied the Boston rule:

Clark v. *United F. & M. Insurance Co.* (1811), 7 Mass. 365 (hull and cargo policy);

Brewer v. *American Insurance Co.* (1877), 123 Mass. 78 (freight, special clause in policy).

England has adopted the Boston rule both as to hull and cargo. *Marine Insurance Act of 1906*, Sec. 73; *S. S. Balmoral Company* v. *Marten* [1902], App. Cas. 511.

Libelant herein contends for the New York rule on the grounds that this rule is supported by the weight of American authority and by all pre-existing authority in our jurisdiction, and that theoretical and practical considerations meet in favoring this rule.

The Circuit Court of Appeals in its decision herein has drawn a distinction between the rules to be applied as to

hull and as to cargo policies, stating that the New York rule should be applied in cases under hull policies and the English rule in cases under cargo policies. That distinction, we respectfully contend, is not only entirely unfounded in any authority, but is groundless theoretically and practically.

POINT TWO.

DECIDED CASES ESTABLISH THE RULE OF FULL INDEMNITY, FOR WHICH LIBELANT CONTENDS, AS THE LAW OF NEW YORK BOTH AS TO HULL AND AS TO CARGO POLICIES.

The earliest authority in New York bearing directly upon the point appears to be the case of *Strong et al.* v. *New York Firemen Insurance Co.*, 11 Johns, 323 (1814). In this case the defendant insured a cargo of rice, flour and peas from Philadelphia to Lisbon, on the ship *Massasoit*. The insured value of the goods was $30,000 which exceeded slightly the invoice value.

The vessel reached Lisbon in safety, but when about one-quarter of the cargo had been delivered a storm arose, giving rise to general average sacrifices. After this accident the Captain refused to deliver the remaining cargo until security was given to cover the general average contributions. Subsequently, an adjustment was duly made up at the port of Lisbon in which the cargo which remained on board at the time of the accident was assessed a general average contribution upon a contributory value of $32,375. The invoice value of this cargo (which was substantially the same as the insured value) was only $22,313. The plaintiff, having duly paid the contribution due from the cargo,

brought this action to recover full indemnity against the defendant underwriters.

The argument of the underwriters, as reported on pages 328 and 329, was precisely the argument which respondent makes in the case at bar. They contended that they were only bound to pay in proportion to the sum they insured, that is the invoice price, and were not bound to pay the whole contribution because it was based on the actual value at Lisbon which exceeded the insured value by about fifty per cent. Defendant relied upon the Massachusetts case of *Clark* v. *Insurance Co.*, 7 Mass. 365, as being exactly in point.

The Court held the underwriters liable for the full sum claimed by the plaintiff, saying, at the bottom of page 333:

> "In this case 'it is distinctly admitted, that, as it respects the owners of the cargo and the owners of the vessel, the average was correctly stated, and rightfully paid in Lisbon'. That this is a loss for which the assurers are liable, is not disputed, and there is no principle more firmly established than that they are bound to return the money which the assured has been *obliged* to advance in consequence of any peril within the policy, provided it be fairly and honestly paid, and does not exceed the amount of the subscription."

In deciding this case the Court also concerned itself with the question of whether or not an adjustment made fairly in a foreign port, but under a law differing from that of the home port, would bind underwriters of the home port. This question has now been settled beyond doubt in accordance with the ruling made in this case. Nevertheless, the question involved in the case at bar was

clearly before the Court, and from the report of the defendant's argument it seems to have been its chief point.

It is respectfully submitted that this decision of the highest court of New York, which antedates the adoption of the other rule in England, thoroughly justifies the description of the rule of full indemnity as the "New York Rule", and should be taken to establish that rule as the law of New York.

In 1882 the Court of Appeals, decided the case of *Providence Steamship Company* v. *Phoenix Insurance Company*, 89 N. Y. 559. This was a suit on a hull insurance policy where the insured steamship, during the life of the policy, went ashore in a storm, and the assured in consequence thereof paid a salvage bill amounting to $21,840. The actual value of the vessel, as shown in the general average statement, was $275,000, but the insured value of the vessel was only $75,000. The assured contended that the underwriters were liable to reimburse him for the full amount of the salvage. The defendant underwriters contended that they were only liable to reimburse the assured for that proportion of the salvage charge which the insured value of the vessel bore to her actual value, namely, 3/11ths.

The Court upheld the contention of the assured on the ground that to permit the underwriters to invoke the actual value of the vessel for the purpose of reducing the claim against them, would be a violation of the principle of valued policies.

Judge Danforth wrote, on page 564:

> "As between these parties, no inquiry is pertinent as to the actual value of the steamer, for as to them it has been fixed by agreement, and for every purpose (fraud being out of the question) it must be taken as so fixed that the insured might be indem-

nified to that amount, for all losses occasioned 'by perils of the sea and navigation.' The value so fixed and inserted in the policy is said to be in the nature of liquidated damages. (3 Kent, 273). It is, therefore, not open to inquiry or dispute after a loss occurs, but is conclusive between the parties in respect of all rights and obligations which arise upon the policy; and the learned commentator above cited disapproves the doctrine of certain cases which suggest a limitation to this rule, by applying it only to a total loss, saying, 'the better opinion of the text-writers is, that in settling all losses, total or partial, the valuation of the property in the policy is to be considered as correct in the adjustment of the loss, and the true measure and basis of the valuation according to the contract of indemnity'."

* * * * * *

"Now the contention of the defendant here is that, as the real value of the steamer was $275,000, the sum of $200,000 represents the interest of the owners and should share the loss caused by the recovery of the ship. The answer to it is that given in the case cited. The insurers are estopped from saying there was any value in excess of the $75,000 agreed upon, and to that extent they undertook to indemnify the owners. They now seek to divide the loss by presenting a different basis of value. If they succeed the assured will lose the indemnity for which they paid, and the consequence of a loss would be cast upon them. Such a result is required by no adjudged case, and would be against the principles both of law and equity. The sum now claimed for the expenses incurred is, we think, justly due the insured on account of damages caused by the perils insured against, and as it is within the limits of the sum named, should be paid by the insurers, according to the terms of the engagement entered into by them."

We have already referred to portions of the decision of Judge Brown in the *St. Paul Case* (100 Fed. 304; *affirmed on opinion below*, 108 Fed. 987; *certiorari denied*, 181 U. S. 623). That also was a suit against underwriters on hull policies. The *St. Paul* stranded, and in freeing and repairing her the assured was forced to pay about $135,000 for salvage and $107,000 for repairs and attendant expenses. The actual value of the steamer before the stranding was $2,100,000, but the agreed policy value, to which extent she was insured, was only $1,350,000.

In connection with the liability for the salvage claim, the underwriters contended that as the actual value (which was determinative in adjusting the salvage charge) exceeded the insured value, they should only be held liable to reimburse the assured in the proportion which the insured value bore to the actual value. The portion of opinion dealing with this question is found on pages 315-317. The Court first recognized that the salvage claim against the underwriters was closely akin to a claim for general average contribution and pointed out that under the law of England and Massachusetts, the contention of the underwriters would appear to be correct. The Court then cited the treatises of *Phillips* and *Dixon*, and the *Providence S. S.* case, to show that the New York rule was different, stating that *in its view the New York rule was more consonant with the terms of valued policies and with the object of valuation in policies, which is to limit both parties on the question of value*. Accordingly, the underwriters were held not entitled to apply the rule of proportion, but liable for the full salvage charge.

Again in another case arising from the *St. Paul* disaster the District Court for the Eastern District of New York and the Circuit Court of Appeals for the Second Circuit

recognized the New York rule as the law of New York. *International Navigation Company* v. *Sea Insurance Company*, 124 Fed. 93; 129 Fed. 13.

It is true that in the *St. Paul* cases, and in the *Providence Steamship* case, hull policies only were involved. There is, however, nothing anywhere in the opinions which indicates in the slightest that the respective Courts would have made any distinction between payments of general average contributions under hull and under cargo policies. On the contrary, it is clear that to permit the underwriters to depart from the insured value and invoke the actual value for the purpose of reducing the recovery against them, is quite as much a violation of the theory of valued policies when applied to general average contributions under cargo policies, as when applied to general average or salvage contributions under hull policies. In each case the loss sustained is a loss of money, and not a loss of the property insured.

Again in 1910, the precise question involved in the case at bar came before the Circuit Court of Appeals for the Ninth Circuit in the case of *Maldonado & Company* v. *British & Foreign Marine Insurance Company*, 182 Fed. 744, *certiorari denied* 220 U. S. 622.

In that case, the respondent insured the libelant's shipment of kapok on a voyage from the East Indies to San Francisco. The agreed policy value of the kapok was $48,623. On the voyage, the ship caught fire and various general average charges were incurred. Toward these charges, the cargo in question was made to contribute $22,544.77 in general average, this contribution being based upon a contributory value of $66,513.29.

The libelant contended that the respondent underwriter was liable to reimburse it for the whole of the general

average contribution. The respondent's contention was that since the contributory value exceeded the insured value, the respondent was only liable for such proportion of the general average contribution as the insured value bore to the contributory value.

These are precisely the same contentions that are being advanced in the case at bar.

Judge Morrow wrote a well knit and exhaustive opinion. We may summarize his conclusions as follows:

1. A contract of insurance is a contract of indemnity within the limit of the valuations stated in the policy.

2. It is settled law that a general contribution fairly assessed upon the thing insured, even though it be assessed under a foreign law, is a loss against which the contract of insurance is a contract of full indemnity.

3. The rule of partial indemnity for general average contributions has been referred to as the English or Boston rule, and has been applied in this country in Massachusetts.

4. The rule of full indemnity is known in the authorities as the New York or American rule, and has been applied in the State and Federal Courts of New York in the cases cited above.

5. Neither the *St. Paul Case* nor any other case cited makes any distinction with respect to payment of general average losses as between cargo policies and hull policies. In England there is no such distinction; the English rule is applied the same with respect to losses on cargo policies as on hull policies. There is no satisfactory or

substantial reason why there should be one rule in respect of cargo and another in respect of hull.

6. The English rule is unfair in that it works in favor of the underwriter but never against him.

7. Insurance companies have always proven attentive and skillful in stipulating exemptions from liability in their policies. As the full indemnity claimed by the assured was not excluded from the risks covered, it is a fair and reasonable inference that such exclusion was not intended.

8. Section 2744 of the Civil Code of California (providing that a marine insurer is liable for a general average contribution) being taken from the proposed Code of Civil Procedure of New York (Section 1511), which was undoubtedly framed as the embodiment of the law of New York as established in the cases cited, shows that the New York rule is established for the port of San Francisco.

9. Decree for libelant in the sum claimed.

This decision is more than a decision on the California law. When the case came before the court sitting in California, there were in that jurisdiction no decided cases bearing upon the question. It was, therefore, necessary for the court to inquire into the sources of the California law. This the court proceeded to do and came to the conclusion that the California law was based upon the New York law so far as concerns payment of general average losses by marine insurers.

The decision, therefore, is in effect a decision on the law of New York.

POINT THREE.

THE TEXT WRITERS FOR NEARLY A CENTURY HAVE UNANIMOUSLY RECOGNIZED THE RULE OF FULL INDEMNITY AS THE LAW AND PRACTICE IN NEW YORK. NO DISTINCTION IS MADE BETWEEN CLAIMS UNDER CARGO AND HULL POLICIES.

Phillips on Insurance went through five editions and one supplement, the first edition being published in 1823 and the last in 1867.

At Section 1410 of the 5th Edition this writer (who lived in Cambridge, Mass.) expounds the Boston or English Rule at some length, but he states toward the end of the section:

> "The practice is different in New York, where, under a valued policy in which the whole value as fixed in the policy is insured, the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes on a value greater or less than that at which it is fixed in the policy, and so proportionally, if one half, one quarter, or any other proportion of the value is insured."

This same statement is found in the earlier editions, appearing first, we believe, in 1834.

Phillips points out that as between the two rules "there is nothing in the policy that favors one of these modes of construction in preference to the other, each being equally consistent with the language of the instrument". He states that the cases seem to be on the side of the English Rule but he cites only the Massachusetts and English cases. The *St. Paul Case*, the *Providence Steamship* case, and the *Maldonado* case all came afterwards.

In 1862 *Dixon on Insurance* was published at New York. On page 162 of the work it appears that the author, Francis B. Dixon, was an adjuster of averages for one of the principal marine insurance companies of New York, and that his experience with payment of general average losses by marine underwriters was very extensive.

On page 44 Mr. Dixon writes:

> *"Are the underwriters on cargo, liable to pay contribution only in the proportion which the sum insured bears to the actual value; or are they liable for the whole amount assessed upon the cargo in general average?*
>
> "According to the practice in Boston, where the contributory value exceeds the value in the policy, the underwriter is liable in the proportion which the sum insured bears to the actual value. *Clark* v. *Unit F. & M. Ins. Co.*, 7 Mass. R., 365.
>
> "In New York, the practice is different under a valued policy in which the whole value as fixed in the policy is insured, the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes on a value greater or less than that at which it is fixed in the policy, and so proportionally, if one-half, one-quarter, or any other proportion of the value is insured."

The same statement was carried into Mr. Dixon's second and last edition of the work, which was published in 1866.

Richards on Insurance, Third Edition, published in 1909, clearly recognizes that the American courts, with the exception of those of Massachusetts, have departed from the English rule (Section 210).

Gow, an English writer who had a number of years experience as a marine underwriter in New York, in his treatise on *Sea Insurance* (1914), recognizes that the rule of

full indemnity is the law and practice in New York (page 165).

It is thus seen that the text writers for nearly a century have recognized the rule of full indemnity as the law and practice of New York, both with respect to losses on cargo policies and on hull policies.

We have searched through the text books with considerable care and have been unable to find in any of them any intimation that any rule other than the rule of full indemnity has been applied in New York.

Likewise we have been unable to find any mention of a distinction between the settlement of general average losses on hull policies and on cargo policies. On the contrary, the passages cited above clearly indicate that the respective writers did not believe there was any such distinction.

POINT FOUR.

THE CIRCUIT COURT OF APPEALS APPLIES A DOCTRINE OF CO-INSURANCE WHICH IS INCONSISTENT WITH THE THEORY AND PURPOSE OF VALUED POLICIES.

The Circuit Court of Appeals states that the question involved is whether "the insured is co-insurer to the extent that the sound value of the cargo is more than the agreed value" (R., 189-190), and bases its decision on the ground that the assured is such a co-insurer.

This decision, we respectfully submit, is grounded in an erroneous application of the doctrine of co-insurance which leads to a result wholly inconsistent with the theory and purpose of valued policies.

With valued policies true co-insurance arises only in cases where the assured has not taken out enough insurance

to cover the whole agreed value. If, for example, the assured takes out only one policy subscribed for $500 on property valued at $1,000, then he has only insured one-half of the risk and has himself to bear the other half. He is a true co-insurer to the extent of one-half of the risk, and none would deny that he must share the risk to the same extent as would a second underwriter had he insured that half of the risk.

If, on the other hand, the assured takes out policies in which the subscribed amounts total in excess of the agreed value, then he has double insurance on part of the risk.

If, however, the assured takes out policies which are subscribed so as exactly to cover the whole of the agreed value, then, strictly speaking, he is not a co-insurer nor does he have double insurance. He has taken out full insurance. No part of the risk is uncovered; no part is covered twice.

The effect of the mutually agreed valuation is to establish a norm to govern the dealings between the assured and the underwriter. The market value of the property becomes external and immaterial as between the parties.

If the market value be less than the agreed value it would be absurd to say that there was any double insurance. If it be more than the agreed value it is, we submit, not proper to say there is co-insurance.

Value is often a vague question of opinion. Moreover, the value of property to its owner is quite different from the market value. The utility, then, of valued policies is obvious.

Commonly transfer of title accompanies the carriage of goods overseas. Commonly such goods are being bought and sold under contracts. They are being dealt with on the basis of agreed sales values.

It is customary to insure the goods for overseas shipment on the basis of the agreed sales value, plus, usually, a small amount for charges or profits. If the goods arrive the seller gets his money and the buyer receives his goods. If the goods are totally lost the seller gets his money from the underwriter and the buyer remains in *statu quo*. If the goods are partially lost or damaged the seller gets the money for the lost portion from the underwriter, and for the saved portion he either gets the money from the buyer or gets the goods back.

The whole transaction is carried through on the basis of the agreed value. The market value remains external and immaterial to buyer, seller and underwriter.

Suppose that the goods arrive in good condition but are subject to contribution in general average. The buyer receives the goods; the seller gets his money. They both look to the underwriter to pay the general average contribution.

The underwriter, however, tells them that the contributory value exceeded the insured value; that they are co-insurers for the excess and must bear a portion of the contribution themselves.

Do they not completely answer the underwriter when they say that the whole transaction was done on the basis of an agreed value; that the underwriter issued to them full insurance on that basis; that the market or contributory value is expressly made external and immaterial by their agreement with the underwriter and for that reason there can be no co-insurance?

It is true that the underwriters' loss may be aggravated by the increase of market value but the loss was caused by a peril insured against. It is a familiar doctrine of insurance law that the underwriter is liable for a loss directly

caused by a peril insured against, even though a concurrent or aggravating cause may have been due to a peril not insured against.

If the goods are not being sold while in transit, the situation is no different. The fact that the assured has taken out a valued policy shows that he prefers his own valuation of the goods to market value. Equally as in the other case, the underwriter has undertaken to deal with him on the basis of an agreed value. Both parties have made the market value external and immaterial.

We respectfully submit that Judge Addison Brown and the New York Court of Appeals were correct when they held that the rule of proportion when applied to general average losses violates the principles of valued policies.

Underwriters urge that in cases of undervaluation the rule of full indemnity violates the agreed valuation, for, they say, the assured has agreed that his goods are worth only the policy value, whereas, in fact, they exceed it.

This argument, it seems to us, involves a distortion of the obvious meaning of a valued policy. When an assured takes out a valued policy he does not represent, nor would any underwriter assume he represented, that the actual value of the goods is identical with the policy value. The underwriter knows well that the goods may have a different value and may change in value. He knows that they may be assessed for general average on a different value.

To say, as the Circuit Court of Appeals does (R., 191), that the agreed value "assures the underwriter against increases in value" seems to us wholly to misconceive the purpose of the contract. It is the purpose of the contract for the underwriter to assure the assured, not vice versa. Limitations to this obvious purpose should not be implied without compelling reasons.

Underwriters contend that since the premium is adjusted on the basis of the policy value it is unfair to hold them for general average contributions assessed upon actual value. The answer to this is that the legal extent of the policy should determine the necessary premium; the premium should not determine the legal extent of the policy. It is common knowledge that in certain classes of insurance the rate of premium is dependent upon the relation between insured value and actual value. And the underwriter, not the assured, fixes the premium.

That the English rule violates the principle of valued policies is further demonstrated by the fact that the rule is inconsistent within itself. This inconsistency was recognized by the Court of Appeal and the House of Lords in *Steamship Balmoral Company* v. *Marten* (*supra* [1902] App. Cas. at 514).

Suppose, for example, that a cargo owner has goods valued in policies at $700,000, but which have increased in value during the voyage to $900,000, and there is a general average as follows:

Total General Average charges	$120,000

Contributing values

Vessel	$	200,000
Freight		100,000
Cargo		900,000
Total	$	1,200,000
Vessel Contributes		20,000
Freight "		10,000
Cargo "		90,000
Total	$	120,000

By the New York rule the cargo owner would be indemnified by his underwriters for the full $90,000.

By the English rule the underwriters would only pay 7/9ths of $90,000, or $70,000.

Now if the English rule is based on the premise that the valuation in the policy "assures the underwriters against increases in value" the result as shown above cannot be upheld. The underwriters should pay upon the same basis as they would have paid on, had the cargo been worth only the policy value. As between the cargo owner and his underwriter a new adjustment should be cast as follows:

Contributing Values—Pay in proportion.

Vessel	$ 200,000	pays	$ 24,000
Freight	100,000	"	12,000
Cargo	700,000	"	84,000
Total	$1,000,000	"	$120,000

Hence if the English rule be based on the premise upon which it is assumed to be based, the underwriters should pay $84,000 but they offer only $70,000.

The fact is that the logic of the English rule is specious. The ratio of insured value to contributory value is undoubtedly attractive to underwriters, but there is no more sound logic to support its application in cases of undervaluation than there is in cases of overvaluation where, as we show in the next point, its application gives the assured more than indemnity so that he makes a clear profit from the casualty.

POINT FIVE.

THE CIRCUIT COURT OF APPEALS MAKES A DISTINCTION BETWEEN CARGO AND HULL POLICIES WHICH IS UNFOUNDED IN PRACTICAL CONSIDERATIONS AND IN AUTHORITY. THE RULE OF FULL INDEMNITY DOES JUSTICE BECAUSE IT INDEMNIFIES THE ASSUREDS FOR ACTUAL DISBURSEMENTS NECESSITATED BY PERILS INSURED AGAINST. THE DECISION IS IN COMPLETE CONFLICT WITH THE RATIONALE OF THE *St. Paul Case*.

The chief ground of the decision of the Circuit Court of Appeals is that, since particular average losses on cargo policies are settled by the rule of proportion whereas on hull policies they are settled by the rule of full indemnity for repairs, there should be a similar distinction in the settlement of general average losses. The Court does not question its earlier decision in the *St. Paul Case*, but distinguishes the case at bar solely on the ground that here a cargo policy is involved, whereas the *St. Paul Case* involved hull policies.

The distinction in the case of particular average is based entirely on practical considerations as is shown by the fact that the distinction would be made even though the policies are in identical terms.

This distinction, however, should not be carried into general average unless there are practical considerations which require it. Cogent reasons should be shown before we construe the same contract differently simply because in one case it is an insurance on hull and in the other on cargo. Any doubts, we submit, should be resolved in favor of uniformity.

While the practical considerations which have given rise to the distinction in particular average are somewhat

obscured in history, the matter has been exhaustively covered by Judge Addison Brown in the *St. Paul Case* (100 Fed. 317-326).

Where goods are damaged by a sea peril, commonly it is quite impossible to repair or restore them to their original state; they must be sold or used in their damaged condition. The question as to the amount of damage is easily answered in terms of a proportion.

It is eminently fair that the underwriter pay as a loss the same proportion of the agreed value as is represented by the physical loss. In that way the agreed value can be made effective and neither party will be involved in fluctuations of market. Another rule would work much unfairness.

If, for example, the policy value of goods is $4,000 and they are half damaged by a sea peril but come to a rising market so that they sell in damaged state for $4,000, the underwriter should not avoid all liability, for the merchant has physically lost one-half of his goods. If, on the other hand, they come to a falling market and sell for only $1,000, the underwriter should not be held for $3,000, for the sea peril has not caused that much damage. If that were the way the insurance was to operate on partial losses of cargo, then the underwriter would be insuring market values and against losses due to the fluctuating values of the goods. But, in truth, the insurance is against physical damage by sea perils. "Neither the insurer nor the assured should gain, or lose from such accidental circumstances."

By ascertaining the percentage of loss and applying it to the policy value, the integrity of the agreement as to the value is maintained, for the underwriter pays such part of the agreed value as corresponds to the physical loss of the cargo.

But such losses bear no similarity to the out-of-pocket disbursements of the cargo owner for general average contributions levied upon his goods.

Ships, on the other hand, are not kept for sale. When a ship suffers damage from a marine peril, her owner does not sell her; he repairs her and thus restores her to her previous condition. The contract of insurance is primarily a contract of indemnity and, obviously, the proper measure of indemnity is the cost of repairs. The assured has paid out that money for the sole purpose of restoring the vessel to her previous condition. The shipowner is reimbursed by his underwriters for a direct expenditure necessitated by a sea peril.

It is thus apparent that there is a striking analogy between the practical considerations applying to particular average on hull and to general average on both hull and cargo, for both are losses caused by actual expenditures of money due to perils insured against. The rule of full indemnity is quite as appropriate in the one case as in the other for it does full justice.

When cargo or hull arrives in port subject to a general average contribution, the only loss which the assured will sustain by reason thereof is through the lien imposed on it. It is not a physical loss of property insured, but is a debt which the property has incurred. There is one, and only one, way for the assured to be rid of the lien and that is for him to pay it off with his money. Having done so, his property is cleared of all effects of the sea peril. The situation is exactly as though he had repaired damaged property and completely restored it to its previous condition. His loss is exactly measured by a payment of money.

We may, indeed, imagine a case where cargo has been damaged by a sea peril in such a way that the assured can and does completely repair the damage. In such a case the loss of the assured should not be settled by the rule of proportion but he should be indemnified by his underwriter for the cost of the repairs.

Such is the ruling of *Francis* v. *Boulton* (1895) 65 L. J. Q. B. 153; 73 L. T. 578; 8 Asp. M. C. 79. There the assured repaired the damage to his cargo, although he was not successful in restoring it to its original condition. The court, however, held that he was entitled to full indemnity from his underwriter for the cost of the repairs. The rationale of the decision is such as to imply unmistakably that if the repairs had completely restored the cargo, the loss would have been settled according to the rule of full indemnity for repairs and not according to the rule of proportion.

Another illustration of this rule is *Gracie* v. *New York Insurance Co.*, 8 Johnson 237 (1811). There cargo was insured for its prime cost by a policy covering the risk of capture. On the voyage the cargo was seized by a French privateer. The assured succeeded in obtaining return of the property by putting up a bond for its appraised value which exceeded the prime cost, i.e. insured value, by 50%. The prize court of last resort sustained the capture and the assured had to make good on his bond, but meanwhile he had sold the goods at destination for more than double the prime cost. He then brought this action against the underwriter, as for partial loss, to recover indemnity for the amount paid on the bond.

Kent, C. J., writing for the court, held that the underwriter was liable for full indemnity up to the amount of the subscription. On page 247 he wrote:

"The assured receives no more than his indemnity, by being reimbursed the sum he has paid. The voyage goes on, and becomes a matter of profit or loss, precisely as if the peril had not happened. • • • He is not to make a profit of the insurance. • • • But in this case, he asks only for the money he has been obliged to pay. He cannot possibly make the insurance lucrative. He asks only to be indemnified from the peril; and whether the property recovered went to a rising or falling market is a question not belonging to the case. That event remains the same as if there had been no capture. If property be ransomed from pirates or enemies, or recovered from shipwreck, at a loss of 60 *per cent* the remainder may possibly go to a market which will render the voyage profitable, even if there had been no insurance, and the expense incurred was a dead loss. So the voyage may be ruinous, if only one *per cent* be taken away by a peril, and that one *per cent* be insured. The insurer, in a case like this, has nothing to do with these results. He must return the money which the assured has been obliged to pay, in consequence of a peril, provided it was fairly and *bona fide* paid, and does not exceed the amount of the subscription."

Another analogous situation arises in the case of claims against underwriters under the sue and labor clauses of the policies. Such claims are very similar in nature to general average claims, in that the disbursements are made for the same purpose, viz., to preserve the insured property from threatening perils. In many cases it is a matter of difficulty even to distinguish between the two. Sue and labor expenditures, if reasonably incurred, are always reimbursed in full to the assurred by the underwriters.

Certainly there is no satisfactory reason why general average contributions should be treated differently.

It is thus apparent that every consideration which dictates the rule of full indemnity in settlement of particular average on hull, and in the settlement of repair and other disbursements by the assured, applies with equal force to general average contributions levied on cargo as well as hull.

The loss is always exactly represented by the number of dollars which the assured had to spend in paying off the general average lien. Complete and exact indemnity is always possible. The New York rule of full indemnity gives in all cases that exact indemnity and nothing more.

To the same extent that the rule of full indemnity is fitting in these cases, the rule of proportion is a misfit.

This becomes peculiarly evident in cases where the insured value exceeds the market value. Suppose, for example, that goods, the agreed value of which is $1000, come to a falling market, where their sound value is only $500. Now if the goods are half damaged by a particular average cause, the assured will receive one-half of the policy value or $500 from the underwriter, although the damage, as measured in the fallen market, is only half that.

There is, however, nothing questionable in permitting the policy valuation to have this effect. The value of the goods to the assured may be quite different from their market value and it does not follow at all that the assured's true loss is accurately measured on the basis of the fallen market value. The agreed valuation is simply given its full effect.

Suppose, however, that instead of being half damaged the goods are delivered sound, but are assessed a general average contribution of 50% on the fallen market value, or $250. Should the underwriter pay the assured $250 or $500?

The Circuit Court of Appeals says that on principle the underwriter should pay the assured $500 (R., 192). This is the extremity to which the Court is put to justify its rule, because on principle the rule, if sound, must be applicable to all situations.

We respectfully submit, however, that there cannot be the slightest justification for this result. Indemnity for the loss of goods may well depend on many circumstances other than market value, but indemnity for a debt of $250 is $250, neither more nor less.

If the assured is allowed to recover $500 indemnity for his debt of $250, then he makes a clear profit out of the casualty. He makes his insurance lucrative, which is precisely what was frowned on by Chancellor Kent in the case just cited. We respectfully submit that a principle of law which, when applied to this ordinary contract of marine insurance, results so questionably is wholly unsound.

In practice English underwriters meet this difficulty simply by refusing to apply the rule of proportion in cases where the insured value exceeds the contributory value. They apply the rule of proportion where it works to the benefit of the underwriter, but where, as in the case just mentioned, it would work to the benefit of the assured, they trust it to fall from its own absurdity.

Surely this demonstrates that the rule of proportion is a misfit in this situation.

While Judge Brown, in the *St. Paul Case*, did not discuss general average losses on cargo policies, nevertheless every consideration which moved him to apply the rule of full indemnity to general average losses on hull policies, applies with equal force to such losses on cargo policies.

We respectfully submit that the decision of the Circuit Court of Appeals in the case at bar conflicts completely in its rationale with the decision in the *St. Paul Case*.

The Circuit Court of Appeals cites no authority to support the distinction which it makes between this case and the *St. Paul Case*. We respectfully submit that there is no such authority.

The cases and texts bearing directly upon this question cover a span of nearly one hundred and twenty years. Not in any of them is there a suggestion that a different rule should be applied to goods than that applying to ships. England and Massachusetts have gone one way, New York the other, but both agree in applying their respective rules uniformly to ship and cargo.

Surely if there had been any merit in the distinction as made by the Circuit Court of Appeals someone would have suggested it long before.

POINT SIX.

APPLICATION OF THE ENGLISH RULE MAKES THE INSURANCE MISLEADING TO THE ASSURED IN THAT A POLICY WHICH PURPORTS TO BE A COMPLETE COVER AFFORDS ONLY PARTIAL INDEMNITY IN CERTAIN CASES. THE RULE THAT THE POLICY MUST BE CONSTRUED AGAINST THE UNDERWRITER DICTATES THE AVOIDANCE OF THIS RESULT BY APPLYING THE RULE OF FULL INDEMNITY.

A serious objection to the English rule is that it results in making the policy of insurance misleading to the assured. For purposes of illustration, let us suppose a typical case.

A merchant under a C. I. F. contract purchases certain goods for $1000. He pays the seller $1000 and receives in return an ocean bill of lading and a policy of insurance which shows that the goods are fully insured against sea perils at invoice plus ten per cent, say $1100 valued at

$1100. Next day the merchant sells the goods for $1100 "to arrive at port of destination", thus making a profit of $100.

Any prudent business man might enter into such a transaction with the assurance that he was taking no risk, at least as to sea perils.

The goods arrive safely at port of destination but the ship has stranded on the way and the market has risen, so that they are subject to a general average contribution of, say, 40% on a contributory value of $2200, i. e., $880. The merchant has to pay this contribution in order to get the goods and fulfill his obligation to deliver to his buyer.

He then asks indemnity from the underwriter for the general average contribution, but the underwriter, under the rule of proportion, would give him only $440.

The merchant would then be out of pocket $440 on the transaction, purely as a result of the sea peril which caused the general average.

There is nothing whatever in the policy of insurance to warn the merchant of this contingency. On its face the policy appears in every way to give him a complete and full cover against sea perils to the extent of the valuation upon the basis of which he was dealing.

Never, we submit, was there better cause to invoke the familiar rule:

> "The language of the policy is, moreover, the language chosen by the insurers. In case of doubt it is not only to be construed against them but it is further subject to the rule of construction that it must be understood in the sense in which the insurers knew that the assured understood or would naturally understand it." *St. Paul Case* (100 Fed. at 308).

Many marine policies written in this country contain a special clause providing for the settlement of general average and salvage losses according to the rule of proportion in cases where the contributory value exceeds the assured value. Mr. Eldert, president of respondent, testified that such clauses were in use and suggested that the Boston Insurance Company inserted them in their cargo policies (R., 26).

In the case put above, the presence of such a clause in the policy would have warned the merchant that he was not fully protected against general average arising from sea perils. If he had been prudent he would then have made some arrangement for protection against the contingency. Without such a clause, however, the merchant has no warning that the policy is not what it appears to be—a full cover.

Perhaps the reason insurance companies are reluctant to use the special clause is because if it be used the policy advertises on its face that it is not a full cover. Objections from assureds would undoubtedly be forthcoming.

These circumstances present a case peculiarly apt for the application of the rule that

> "Where a policy of insurance is so formed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer." *Liverpool, London & Globe Insurance Company* v. *Kearney*, 180 U. S. 132 at 136.

This principle has been stated by this Court many times. See for example *London Assurance* v. *Companhia De Moagens*, 167 U. S. 149 at 159; *Royal Insurance Company* v. *Martin*, 192 U. S. 149 at 162; *Mutual Insurance Company* v. *Hurni Company*, 263 U. S. 167 at 169.

POINT SEVEN.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN REFUSING TO FOLLOW EARLIER DECISIONS OF COURTS OF LAST RESORT VIOLATES THE PRINCIPLE THAT A CONTRACT IS TO BE CONSTRUED IN THE LIGHT OF THE LAW AS DECLARED AT THE TIME OF ITS MAKING. *Stare decisis* IS PECULIARLY APPLICABLE.

The contract of insurance here involved was entered into in New York and was to be performed in New York. At the time this contract was made (1915) the law of New York on the point here involved was well rounded out by decisions of courts of last resort.

The state court of last resort had in the *Strong* case applied the New York rule to a cargo policy, and in the *Providence Steamship* case it had applied the same rule to a hull policy.

The Circuit Court of Appeals for the Second Circuit had in the *St. Paul Case* applied the New York rule to a hull policy, and in the *Maldonado Case* the same rule had been applied to a cargo policy by the Circuit Court of Appeals for the Ninth Circuit in a decision based upon New York law. In both of these cases *certiorari* was denied so that the decisions were in courts of last resort. Neither in the state or federal courts, nor in any text, had it ever been questioned that the New York rule was the law of New York as applied to both hull and cargo policies.

The following principle has been stated many times by this court:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or

incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, at p. 550.

See *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Rees* v. *City of Watertown*, 19 Wall. 107, 121; *Edwards* v. *Kearzey*, 96 U. S. 595, 601; *Siebert* v. *Lewis*, 122 U. S. 284; *Northern Pacific Ry.* v. *Wall*, 241 U. S. 87, 91.

Under these decisions it is clear that if the State of New York had, after the making of this contract, enacted a statute changing the law of New York to conform with the English rule, that statute, applied to this contract, would have been void as being an impairment of its obligations.

Indeed, if the Court of Appeals of New York had reversed itself after the contract was made, this court would, under the reasoning of *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, have interpreted the contract in the light of the earlier decision.

Technically, we presume, the decision of the Circuit Court of Appeals in the case at bar does not conflict with the constitutional inhibition against impairment of the obligations of contract. Practically, however, the effect of the decision is just that. The same juridical principles which dictated the insertion of that clause in the Constitution should be most persuasive here.

Stare decisis has long been recognized as being of the highest importance in commercial and property cases where contracts and deeds are made in reliance upon the law as declared by decisions of courts of last resort. *Black's Law of Judicial Precedents*, page 693. New York is the American center of marine underwriting and it is fair to assume that thousands of merchants, themselves and through their

insurance brokers, have taken policies with New York underwriters relying upon the law of New York as declared in the above-mentioned decisions.

Respondent has urged below the desirability of conforming our law to that of England. This the decision of the Circuit Court of Appeals wholly fails to accomplish, for, as we have shown, it draws a distinction between hull and cargo policies which is unknown in England. The only way in which our law can be conformed to that of England is by overruling the *St. Paul Case* and the other decisions on hull as well as cargo.

When it is remembered that the New York rule was adopted here before the English rule was adopted in England, and when all of the considerations above pointed out are taken into account, it is clear that uniformity with England can only be achieved at the price of sacrificed principles many times more valuable than any uniformity, however desirable.

LAST POINT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND THE ORIGINAL DECREE OF THE DISTRICT COURT AFFIRMED.

Respectfully submitted,

IRA A. CAMPBELL,
Proctor for Petitioner.

New York, February 14, 1929.